

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A
JUDGE: CYNTHIA A. HOLLOWAY
NO.: 00-143

Florida Supreme Court
Case No.: SC00-2226

**JUDICIAL QUALIFICATIONS COMMISSION'S MOTION IN OPPOSITION
TO
JUDGE CYNTHIA A. HOLLOWAY'S MOTION TO STAY DEPOSITIONS**

JUDICIAL QUALIFICATIONS COMMISSION (hereinafter "JQC"), by and through the undersigned Special Counsel, and pursuant to Rule 21 of the Florida Judicial Qualifications Commission Rules and Rule 9.310 of the Florida Rules of Appellate Procedure, hereby respectfully submits its Motion in opposition to Judge Cynthia A. Holloway's Motion to Stay the depositions scheduled in this cause on February 26, 27 and 28, 2001 and requests this Honorable Court grant an Order Denying Judge Holloway's Motion to Stay Depositions, and in support thereof states as follows:

PROCEDURAL HISTORY

1. On October 26, 2000, the Investigative Panel of the JQC filed its Notice of Formal Charges against The Honorable Cynthia A. Holloway, Circuit Judge for the Thirteenth Judicial Circuit, alleging violations of Canons 1, 2, 3, and 5 of the Code of Judicial Conduct.
2. On December 14, 2000, the undersigned Special Counsel filed the names and addresses of nineteen potential witnesses and a catalogue of sworn statements and/or transcripts in accordance with the JQC's discovery obligations pursuant to Rule 12(b) of the Florida

Judicial Qualifications Commission's
Motion to Deny Judge

Holloway's

Motion to Stay Depositions
Page 2

Judicial Qualifications Commissions Rules.

3. On or about January 31, 2001, Mr. Scott Tozian, as counsel for Judge Holloway, filed a Motion to Compel any and all witness interview summaries authored by the JQC's private investigator, Mr. Robert Butler. In addition, Mr. Tozian filed a Motion for Protective Order seeking to halt the scheduled discovery deposition of Judge Holloway pending a decision regarding the requested witness interview summaries. Both Motions were filed with the JQC's Hearing Panel in accordance with Rule 7(b) of the Florida Judicial Qualifications Commissions Rules.

4. On or about February 15, 2001, the undersigned Special Counsel filed the JQC's Response opposing Judge Holloway's Motion to Compel and Motion for Protective order on numerous grounds. Principally, the JQC alleged the requested witness summaries were non-discoverable as protected by the work product doctrine. An Affidavit of investigator Robert Butler was also filed as direct evidence of the work product nature of the requested documents.

5. On or about February 20, 2001, the Honorable Judge James Jorgenson, Chairman of the Judicial Qualifications Commission Hearing Panel, entered an Order denying Judge Holloway's Motion to Compel and Motion for Protective Order, and further ordered that the subject depositions take place on February 26, 27 and 28, 2001, as scheduled.

6. On February 21, 2001, Mr. Tozian filed a second Motion to Compel the witness

Judicial Qualifications Commission's
Motion to Deny Judge

Holloway's

Motion to Stay Depositions

Page 3

summaries prepared by the JQC investigator with the this Court, seeking a review of Judge Jorgenson's Order. In addition, Mr. Tozian filed the subject Motion to Stay the scheduled depositions, also with this Court.

7. Based upon the following argument, the Court should deny the Motion to Stay filed on behalf of Judge Holloway.

ARGUMENT

Judge Holloway's Motion to Stay is not properly before this court and, as such, should be dismissed. Rule 21 of the Florida Judicial Qualifications Commission Rules specifically provides that the Florida Rules of Appellate Procedure apply for the review of Investigative and Hearing Panel proceedings by the Supreme Court. Florida Rule of Appellate Procedure 9.310 (a) states, in material part, that "a party seeking to stay a final or non final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief." Therefore, pursuant to Rule 9.310(a), in order to properly seek a stay of the scheduled depositions, Judge Holloway must first seek relief from the lower tribunal, which, in this case, is the Hearing Panel of the JQC.

The First District Court of Appeals applied Rule 9.310(a) in *MSQ Properties v. HRS*, 626 So.2d 292 (Fla. 1st DCA 1993), a case procedurally on point. In that case, MSQ Properties sought an appeal of a contract award decision allegedly made in error by the Department of

Judicial Qualifications Commission's
Motion to Deny Judge

Holloway's

Motion to Stay Depositions
Page 4

Health and Rehabilitative Services (HRS). In addition to an appeal of the agency's contract decision, MSQ moved the First District Court of Appeals for a stay of the contract award pending appeal. The First District dismissed MSQ's Motion to Stay pursuant to Fla. R. App. P 9.310(b), and held that "the appellant should first apply to the agency for ...relief (or the stay)." *Id* at 293.

In this case, as in *MSQ Properties, supra*, Judge Holloway must seek the appropriate relief from the JQC Hearing Panel prior to seeking review from this court.¹

WHEREFORE, the JUDICIAL QUALIFICATIONS COMMISSION, by and through the undersigned Special Counsel, respectfully requests this Honorable Court deny Judge Holloway's Motion to Stay the scheduled depositions.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail to: Honorable Thomas D. Hall, Clerk, Supreme Court of Florida 500 South Duval Street, Tallahassee, Florida 32399-1927; with copies by U.S. Mail and Facsimile to: Scott K. Tozian, Esquire, SMITH & TOZIAN, P.A., 109 North Brush Street, Suite 150, Tampa, Florida 33602; Michael S. Rywant, Esq. RYWANT, ALVAREZ, JONES, RUSSO & GUYTON, P.A., 109 N. Brush Street, Suite 500; John Beranek, Esquire, AUSLEY & McMULLEN, Washington Square Building, 227 Calhoun Street, Tallahassee, Florida 32302; Honorable James R. Jorgenson, Chair, Hearing Panel, Third District Court of Appeals, 2001 S.W. 117th Avenue, Miami, Florida 33175-1716; and Thomas C. MacDonald, Jr. General Counsel, JQC, COOK & MACDONALD, 100 N. Tampa Street, Suite 2100, Tampa, Florida

¹ The JQC is not admitting that this matter would be properly before this Court even if Judge Holloway had followed appropriate procedures by first seeking relief from the JQC Hearing Panel due to the interlocutory nature of the ruling to which exception is taken.

Judicial Qualifications Commission's
Motion to Deny Judge

Holloway's

Motion to Stay Depositions
Page 5

33602, this _____ day of February, 2001.

By: _____
Beatrice A. Butchko, Special Counsel,
Judicial Qualifications Commission
KAYE, ROSE & MALTZMAN, LLP
One Biscayne Tower, Suite 2300
2 South Biscayne Boulevard
Miami, Florida 33131
Tel.: (305) 358-6555
Fax.: (305) 374-9077